IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 159 OF 2003
WITH
CIVIL APPLICATION NO. 187 OF 2003

1. Gangubai w/o Ganapati
Londhe and ors. ..Appellants

Vs.

1. Radhabai w/o Babasaheb Shelke
(since deceased by her LRs)
1A. Smt. Malan Bhaskar Shelke
and ors. ..Respondents

Mr. P.S. Dani with Mrs. P.V. Hingorani for appellants.
Mr. Amit D. Sale for the respondent nos.1a to 1c.

CORAM: B.H. MARLAPALLE, J.

Date : April 16, 2007.

P.C.:

1. Heard Mr. Dani the learned counsel for the appellants-original defendants in Regular Civil Suit No. 211 of 1986. The plaintiff Radhabai, wife of Babasaheb Selke is the sister of defendant no.1 Gangubai, wife of Ganapati Londhe, who died during the pendency of this second appeal. The plaintiff's sister claimed her half share in the following properties, both agricultrual as well as residential:-

Sr.No.	Gat Nos.	Area	Assessment
(1)	61(S.No.1/1)	0.02	0.05(1 ana 6 P)
(2)	4(S.No.1/3B)	0.05	0.69 Full
	P.K.	0.01	
(3)	66(S.No.4/2A)	0.32	0.28 Full
	P.K.	O.03	
(4)	56(S.No.4/2C)	0.56	0.09(5-A 4 P)
(5)	64(S.No.4/4A)	0.19	0.41 Full
	P.K.	0.05	
(6)	80(S.No.5/3)	0.22	0.25 Full
	P.K.	0.12	
(7)	77(S.No.5/5)	0.01	0.03 Full
	P.K.	0.01	
(8)	92(S.No.9.1A)	0.47	1.37 Full
	P.K.	0.01	
(9)	94(S.No.9/1C +2A)	0.92	3.13 Full
(10)	97(S.No.9/2D)	0.86	2.07 Full
(11)	139(S.No.13/1C)	0.24	0.94 Full
	P.K.	0.01	
(12)	136(S.No.12)	5.29	11.87(8-A 11-P)

13. Mulanwadi Grampanchayat property No.5 having area admeasured 6 khans Malvadi facing towards north, 6 khans' roof of tin-sheet, 5 khans Chhappar and open space.

14. Mulanwadi Grampanchayat Property No.11 having area admeasuring 15' breadth & 50' long open space.

. Admittedly, the properties at Sr.Nos.13 and 14 are residential properties and the properties at

Sr.Nos.1 to 12 are agricultural lands belonging to Hajarat Masaheb Peer Trust of village Mulanwadi.

2. Father Balu died on 1/12/1955 leaving behind him his wife Geetabai and the two daughters, namely, Radhabai-plaintiff and Gangubai-defendant no.1. On the demise of Balu it was his wife Geetabai who continued to cultivate the land and she was in cultivation as on 1/4/1957 i.e. the tillers' day and thus she became the deemed purchaser. Geetabai died on 16/11/1968 and at that time defendant-Gangubai was staying with Geetabai, the mother. Whereas the plaintiff was married in some other village i.e. Gorewadi. It was alleged by the plaintiff that on the demise of the mother on 16/11/1968 though defendant no.1 continued cultivation, she was giving half share in the agricultural produce to the plaintiff and, therefore, she never raised any objection. However, before filing of the suit, defendant no.1 refused to give any share to the plaintiff and consequently she claimed to have made inquiries regarding the ownership etc. and found that in the 7x12 extract the names of defendant nos.2 to 5 were entered on the basis of a

purported gift deed executed by Geetabai i.e. the mother. Defendant nos.2 to 5 are the children of Gangubai. It was under these circumstances, the plaintiff filed Regular Civil Suit No. 211 of 1986 for partition and separate possession of ancestral properties. The defendants filed their Written Statement at Exh.28 and opposed the same. It was contended that Geetabai had gifted the suit properties except the properties at Sr.Nos.3 to 7 and 10 and 11 to defendant nos.2 to 5 in the year 1957 itself and the other properties were retained by Geetabai for her maintenance. Plaintiff never came to village Mulanwadi to look after her mother and the defendant no.1 transferred the properties in the names of her children i.e. defendant nos.2 to 5. Defendant No.5 also filed Written Statement at Exh.29 and claimed that the entire landed property as well as the house were gifted by Geetabai to defendant nos.2 to 5 under the Gift Deed dated 31/10/1957 (Exh.62). They also denied that they were sharing any part of the agricultural produce with the plaintiff after the demise of Geetabai in 1968 and it was further contended that the properties which were not covered

by the Will were given away by Geetabai to her daughter Gangubai under an oral Will as Gangubai was looking after her since begining. The learned Civil Judge, Junior Division, Vita vide his judgment and order dated 20/3/1993 considered the rival contentions of both the parties as well as the scheme of Section 27 of the Bombay Tenancy and Agricultural Lands Act, 1948 and held that the plaintiff was having half share only in four properties which was not covered by the Will (agricultural lands) and the house properties were self acquired properties, whereas the remaining agricultural land was gifted by Geetabai and, therefore, the plaintiff was not entitled to claim any share.

3. The plaintiff, therefore, approached the District Court in Regular Civil Appeal No. 229 of 1993 and it is pertinent to note that the defendants did not challenge the decree for partition of four agricultural lands which were also belonging to the Trust and covered by the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948. The Lower Appellate Court by its judgment and order dated

10/10/2002 partly allowed the appeal and modified the decree passed by the trial court. The learned III Ad-hoc Additional District Judge, Sangali held that the house property was the self acquired property and thus confirmed the finding of the trial court. But on the second issue regarding the gift deed, it held that the gift deed at Exh.62 could not be held to be valid in view of the provisions of Section 27 of the Bombay Tenancy and Agricultural Lands Act 1948. It held that Geetabai had no right to alienate any of the agricultural lands, including the alienation by gift unless she had followed the provisions of the said Act. Section 27 of the Bombay Tenancy and Agricultural Lands Act, 1948 reads as under:-

> "**27. Sub-division, sub-letting and assignment prohibited**,-- (1) Save as otherwise provided in section 32F no sub-division or sub-lettering of the land held by a tenant or assignment of any interest therein shall be valid:
>
> . Provided that nothing in this sub-section shall prejudicially affect the rights of a permanent tenant:
>
> . Provided further that if the tenant dies,-
>
> (i) if he is a member of a joint family, the surviving members of the said family, and

(ii) if he is not a member of a joint family, his heirs, shall be entitled to partition and sub-divide the land leased subject to the following conditions--

. (a) each sharer shall hold his share as a separate tenant,

. (b) the rent payable in respect of the land leased shall be apportioned among the sharers, as the case may be, according to the share allotted to them,

. (c) the area allotted to each sharer shall not be less than the unit which the State Government may, by general or special order, specify in this behalf having regard to the productive capacity and other circumstances relevant to the full and efficient use of the land for agriculture.

. (d) if such area is less than the unit referred to in clause (c), the sharers shall be entitled to enjoy the income jointly, but the land shall not be divided by metes and bounds,

. (e) if any question arises regarding the apportionment of the rent payable by the sharers, it shall be decided by the Mamlatdar, whose, decision shal be final.

(2) Notwithstanding anything contained in sub-section (1), it shall be lawful for a tenant,

(a) who is a widow, minor or a person subject to any physical or mental disability, or a serving member of the armed forces, to sub-let such land held by her or him as a tenant; or

(b) who is a member of a co-operative farming society and as such member to sub-let, assign, mortgage or to create a charge on his interest

> in the land in favour of such society, or in consideration of a loan advanced by any person authorised under section 54 of the Bombay Agricultural Debtors Relief Act, 1947.
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> (3) Notwithstanding anything contained in sub-section (1), it shall also be lawful for a tenant to mortgage or create a charge on his interest in the land in favour of the State Government in consideration of a loan advanced to him by the State Government under the Land Improvement Loans Act, 1883, the Agriculturists' Loans Act, 1884, or the Bombay Non-Agriculturiests' Loans Act, 1928 or in favour of a co-operative society in consideration of a loan advanced to him by such co-operative society and iwthout prejudice to any other remedy, open to the State Government or the co-operative society, as the case may be, in the event of his making default in payment of such loan in accordance with the terms on which such loan was granted, it shall be lawful for the State Government or the co-operative society, as the case may be, to cause his interest in the land to be attached and sold and the proceeds to be applied in payment of such loan."

. It clearly states that the right of permanent tenant is heritable on his death and heirs are entitled to claim partition of such land. Section 14 of the Act deals with termination of tenancy and the Trust at no point of time or any Revenue Officer under the Act had given a declaration that the tenancy was terminated.

4. Mr. Dani the learned counsel for the appellants submitted that even if the plaintiff and defendant no.1 were the full blood sisters of the original tenant Balu, the agricultural land which is tenanted could not be partitioned and, therefore, once the gift deed was found to be invalid by the Lower Appellate Court, it was necessary that the suit was remanded to the trial court. This submission cannot be accepted, firstly, because the decree passed by the trial court in respect of the other four agricultural lands was not challenged by the defendnants and the scheme of Section 27 does not prohibit partition of tenancy rights amongst the legal heirs. The Lower Appellate Court, therefore, considering the scheme of Section 27 was right in its conclusions that Geetabai could not have gifted away the landed property as set out in the gift deed at Exh.62 in view of the statutory bar and it rightly stepped into correct the legal error committed by the trial court in that regard.

5. No substantial question of law arises for consideration of this court in this second appeal and

having regards to the fact that the plaintiff and defendant no.1 are two sisters of the tenant, they were undoubtedly have half share in the tenanted property and, therefore, the decree passed by the Lower Appellate Court does not call for any interference.

6. Hence the second appeal is dismissed in limine.

7. Civil Application No. 187 of 2003 does not survive and the same shall stand disposed as such.

(B.H. Marlapalle,J.)